mailed 4/14/98

In the Matter of:		
William Hogan		
Claimant		
against		
John T. Clark & Sons		
Employer	Case No.:	98-LHC-172
and		
	OWCP No.:	01-138794
Liberty Mutual Insurance Co.		
Carrier		

APPEARANCES:

David J. Berg, Esq.
For the Claimant

Jean M. Shea, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on February 3, 1998 in Boston, Massachusetts, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and RX for an Employer/Carrier's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
ALJ EX 4a	District Directors referral letter to the Office of Administrative Law Judges, together with	1/9/98
ALJ EX 4b	Claimant's Pre-Hearing Statement	1/9/98
CX 4a	Claimant's counsel's letter with	3/26/98
CX 4b	Claimant's Closing Brief	3/26/98
RX 7a	Respondents' counsel's letter with	4/1/98
RX 7b	Respondents' Closing Brief	4/1/98

The record was closed on April 1, 1998, as no further documents were filed.

Stipulations and Issues

The parties stipulate, (TR 6-8, 10)**, and I find:**

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On October 17, 1996, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation, and the Employer filed a timely notice of controversion on September 23, 1997.

6. The parties attended an informal conference on September 9, 1997.

7. The applicable average weekly wage is $ 733.37.

8. The Employer and Carrier have voluntarily, and without an award, paid temporary total compensation from October 17, 1997 through June 5, 1997, at $488.94 per week, and permanent partial disability benefits from June 6, 1997 to present and continuing at

$488.94 per week. Additionally, Employer and Carrier have paid medical expenses approximately totaling $16,000.00.

The unresolved issues in this proceeding are:

1. The date of Claimant's maximum medical improvement.

2. The nature and extent of Claimant's disability.

Summary of the Evidence

William Hogan ("Claimant") is sixty (60) years of age, with an eighth grade education and an employment history of manual labor as a longshoreman. (TR 17-18) During Claimant's thirty-nine (39) years as a longshoremen, he testified to performing almost every labor job in the shipyard, with the exception of operating cranes. (TR 19-21, 42) Claimant has worked as a supervisor, or gang boss, noting that this was, in actuality, a working supervisor position, as he would pitch in to both assist and teach the other laborers. (TR 22-23) At the time of his injury, Claimant was working for John T. Clark & Sons ("Employer"), at a maritime facility adjacent to the navigable waters of Boston Harbor and the Atlantic Ocean, where the Employer loads and unloads ships.

On the morning of October 17, 1996, Claimant was working at Colony Terminal as a lander, and his duties were to remove pins from containers so that the containers could be unloaded and taken out by a crane. (TR 24) As Claimant was removing a pin from one container, the crane holding the container snapped and the pin crushed and drilled completely through his right hand. (TR 25)

Claimant's next memory was being in the Employer's "hot room," prior to being rushed to Boston City Hospital. (TR 26) According to a description provided in a later report of Alan D. Weiner, M.D., a Dr. Paul Costas performed surgery at Boston City Hospital, where pins were placed in Claimant's hand. (RX 5) Dr. Weiner's report notes that Dr. Costas "indicated that there was an obvious comminuted open fracture at the base of the promimal phalanx of the 4^{th} metacarpal, as well as dislocation of the distal mid-phalanges at the PIP joint of the 5^{th} finger of the right hand. There was also evidence of severe soft tissue injury. Post-operative x-rays revealed reduction of the comminuted fracture with insertion of two Kirshner wires." (RX 5) The pins inserted into Claimant's right hand were removed in mid-January 1997. (RX 5)

Dr. Weiner continued to note Claimant's post-operation progress. Following the removal of the pins, Claimant entered a program of rehabilitation for approximately six months, going

several times a week. Despite this intensive program, Claimant was left with "stiffness in the ring and little fingers of the right hand with loss of sensation and a flexion deformity." (RX 5) Dr. Weiner noted that Claimant was right-handed, but due to the accident he had very little functional use of his right hand. (RX 5)

Dr. Weiner, in a June 3, 1997 report, noted the Claimant's physical condition, and stated that Claimant's "main difficulty is in extension where he does have a keloid involving the flexor surface of the little finger which restricts extension at the PIP joint of the little finger. He also has restricted extension at the PIP joint of the ring finger." (RX 5) Dr. Weiner then provided his diagnosis as to Claimant's condition, stating, "I have discussed his situation with his therapist and it appears that he has reached a plateau. I believe it would be worthwhile for him to be instructed in a home program particularly involving some squeezing to increase his power and strength and then check him in a week to see how he is doing." (RX 6) Dr. Weiner went on to discuss Claimant's limited work capacity, stating, "I believe that he does have a work capacity," however, "he could not return to a job which required him pulling ropes or heavy lifting with the right hand." (RX 6) Finally, Dr. Weiner noted, "I would postpone ascertaining his end result until one year after his injury." (RX 6)

On September 3, 1997, Claimant was examined by Leonard K. Ruby, M.D. (CX 1) Dr. Ruby performed a physical examination, determining Claimant's range of motion, and measured his grip strength and pinch strength. Dr. Ruby concluded that surgery would not improve the Claimant's condition. (CX 1)

On October 8, 1997, Dr. Ruby responded to a series of questions sent by Attorney Michael B. Latti. (CX 2) In this letter, Dr. Ruby noted that Claimant has "reached an end result." (CX 2) Further, Dr. Ruby stated that Claimant is permanently disabled from pursing his usual occupation as a longshoreman. (CX 2) Additionally, Dr. Ruby provided his opinion as to the loss of use of function in Claimant's hand and right upper extremity:

> There is significant loss of motion of the PIP joints of all digits but particularly the right and little fingers. Ring finger PIP is -50/90 and little is -55/90. Distal joint for little finger is 0/35. Therefore, loss of two-thirds of motion of PIP joint of both digits which is 65% loss of function of these two digits. This adds to 20% loss of function of the affected hand, is 10% of the entire right upper extremity. (CX 2)

Subsequently, following a November 4, 1997 physical examination, Dr. Weiner concluded:

> I believe that Mr. Hogan has reached an end result. No further surgery has been recommended to the right and little fingers of the right hand, other than consideration of amputation which may or may not improve the functioning of his hand as a whole. At this point in time he appears to be left with both functional range of motion impairment as well as sensory impairment to the ring and little fingers. I believe he has 100% functional impairment of the ring and little fingers of his right hand which translates to approximately 30% functional impairment of the hand in this right-handed individual. (RX 5)

Claimant testified that he finished physical therapy after approximately six months, as he was told he had reached the point of no further improvement. (TR 26-27) Currently, Claimant testifies that he "always" takes pain relievers such as Advil or Motrin Extra Strength, commenting, "I live on it to be honest with you." (TR 35) Further, his right hand hurts about three days a week, and he has no feeling on his forth or fifth digits, or the right side of his right hand. (TR 29) Additionally, Claimant's right hand continually shakes due to his nerve problems and his hand is extremely sensitive to the cold. (TR 32-33) This Administrative Law Judge noted such shaking as Claimant sat in the witness box.

At the hearing Claimant was wearing a bandage on his right hand, with his right ring and little fingers in a sleeve. Claimant testified that he wears the bandage and apparatus often, but not everyday. He testified that the bandage and sleeve serve to both keep his hand warm and to straighten his last two fingers, however, he has seen no straightening of his fingers since wearing the bandage. (TR 32, 45)

Dr. Weiner did not recommend any further surgery, however, he noted that amputation "may or may not improve the functioning of [Claimant's] hand as a whole." (EX 5) Claimant, however, testified that he has refused to undergo surgery to amputate his right ring and little finger. (TR 28)

Since his injury Claimant has neither worked, nor looked for employment. (TR 35) He testifies that he has not looked for work predominantly because longshore work is all he has ever known and he is unable to use his right hand. (TR 37) Claimant testified that he mainly watches television and takes walks during the day. Claimant testified that he has no functional capacity in his right

hand, and that his daily duties have become increasingly difficult. Claimant testified that while he could drive an automobile, he could not solidly grip the wheel with his right hand and that often his daughter drives him around. (TR 34) He did state that his children, especially his oldest daughter living at home, take care of him and the housework, by cooking, cleaning and performing other errands. (TR 34-36)

When asked about whether he could perform the jobs of a security officer, or telemarketer he was not sure if he could perform those duties solely with his left hand. Further, he expressed anxiety about learning a new job at his age, and with his lack of experience. (TR 36-38) Claimant also reiterated his inability to use his right hand and that he is not able to utilize his left hand as well as he formerly used his right hand. At the hearing, Claimant signed a piece of paper with his right hand. This signature displayed extremely sloppy writing, and did take the Claimant a few moments to write. (CX 3)

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of a credible Claimant and witness, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846

(1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that a "**prima facie**" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S. Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once a claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the

record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right hand, resulted from working conditions at the Employer's maritime facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S. CT. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and

unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes that Claimant severely injured his right hand in an accident on October 17, 1996, that the Employer had timely notice thereof, authorized appropriate medical care and treatment and paid appropriate medical care and treatment and has paid, and continues to pay partial compensation benefits while Claimant has been unable to work, and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D. Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. **Id**. at 1266.

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled**

Industries, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268, 277 n.17 (1980) [herein "**Pepco**"]; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Claimant has testified that, due to his injury he is unable to return to work as a longshoreman. (TR 36) Further both Dr. Weiner and Ruby have stated that Claimant cannot return to his previous employment. (RX 6; CX 2). Therefore, on the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work as a longshoreman. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability, and, therefore, is not limited to the schedule provision of sections 8(c)(1)-(20). **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any probative and persuasive evidence as to the availability of suitable alternative employment, as further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General**

Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled,

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

Employer has argued that Claimant reached maximum medical improvement on June 3, 1997, the date of Dr. Weiner's letter in which he stated that Claimant had "reached a plateau." (TR 16) I rejected this date because at that time Dr. Weiner was actually recommending further medical attention. Despite Dr. Weiner's finding that "it appear[ed] that he has reached a plateau," the doctor also stated, "I believe it would be worthwhile for him to be instructed in a home program particularly involving some squeezing to increase his power and strength and them check him in a week to see how he is doing." (RX 6) Therefore, Dr. Weiner is recommending further treatment and examination, and I interpret such action as inconsistent with a finding of maximum medical improvement.

Moreover, Dr. Weiner, in his June 3, 1997 report, expressly states, "I would postpone ascertaining his end result until one year after his injury," which further supports the conclusion that Dr. Weiner felt Claimant's condition could improve in the near future. Rather, I find Dr. Weiner's letter of November 4, 1997 a more persuasive opinion of Claimant's date of maximum medical improvement. The November 4, 1997 opinion was made over a year following the incident and Dr. Weiner provided a disability rating of 30% for Claimant's right hand. I note that the date of maximum medical improvement concerns the date that Claimant's condition will no longer improve. However, Dr. Weiner's November 4, 1997

opinion clearly states that no further surgery is recommend. Additionally, he does not suggest any further therapy. Accordingly, I find Dr. Weiner's November 4, 1997 report more realistic and persuasive as to the date of maximum medical improvement. Despite this finding, however, I also reject the November 4, 1997 date, as shall now be discussed.

The Claimant has argued that the date of maximum medical improvement is October 8, 1997, the date that Dr. Ruby indicated that Claimant had "reached an end result." (CX 2) Dr. Ruby's opinion was based, in part, upon his September 3, 1997 examination of Claimant. (CX 1) Dr. Ruby, in a letter to Attorney Latti, noted Claimant's disability levels, and that he reached maximum medical improvement. I note that this opinion was offered almost one year following Claimant's initial surgery, and is based on both objective studies and physical examination of the Claimant. Further, it is supported by Dr. Weiner's subsequent report and examination occurring just a few weeks later.

Therefore, on the basis of the totality of this record, I find and conclude that Claimant reached maximum medical improvement on October 8, 1997 and that he has been permanently and totally disabled from October 9, 1997, according to the well-reasoned opinion of Dr. Ruby.

Suitable Alternate Employment

As the Claimant has met his burden of proving the nature and extent of his disability and his inability to return to work, the next question is whether the Employer can produce sufficient evidence to reduce Claimant's disability status from total to partial. In the majority of jurisdictions, once a claimant meets his or her initial burden, the burden then shifts to the Employer to demonstrate the existence of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which the Claimant could secure with diligent effort. **See Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1041 (2d Cir. 1997). The First Circuit, however, under whose jurisdiction this case arises, has a different approach as to when the burden will switch to the Employer.

The First Circuit has held that the severity of an employer's burden must reflect the realities of the situation, and that the burden will not shift in all cases. As such, the First Circuit does not place the burden on an employer in situations where it is obvious that there are available jobs that someone of the claimant's age, education and experience could perform. **See generally Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st

Cir. 1979). The Benefits Review Board has described the First Circuit's **Air America** holding as follows:

> [T]he strength of the presumption of total disability, and hence the severity of the employer's burden to overcome the presumption, should reflect the reality of the situation. The [First Circuit] determined that, depending on the situation, employer may not have the heavy burden of establishing actual job opportunities. The court, however, also recognized that it is reasonable to require the employer to prove the availability of specific suitable alternate jobs when an employee's inability to perform any work seems probable in light of the employee's physical condition and other circumstances, such as employee's age, education and work experience.

Dixon v. John J. McMullen & Assoc., 19 BRBS 243 (1986).

In **Air America**, the claimant was a pilot who contracted a tropical disease while working in Southeastern Asia. **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979). This disease left the claimant with varying degrees of numbness in his limbs and extremities, and rendered him unable to continue his employment as a pilot. In light of the claimant's education and ability, the court noted that is was obvious that claimant could find available employment, and therefore, it was not necessary for the employer to present evidence of suitable alternate employment. **Id.** at 779. The court stated that if a "medical impairment affects only a specialized skill that is necessary in [the claimant's] former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." **Id.**; **see also Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981) (holding that a young, intelligent man was not unemployable).

The **Air America** court, however, limited its holding, noting that this standard is not applicable where "the claimant's medical impairment and job qualifications [are] such that his suitable job prospects would be expected to be very limited, if existent at all." **Id.** at 780. The court provided a list of several cases where claimant's future employment opportunities would be sufficiently limited to require the burden be placed on the Employer to find suitable and available alternate employment. In each of the cited cases, the particular court stressed claimant's work experience and educational background as relevant in determining future job prospects. **See American Stevedores, Inc. v.**

Salzano, 538 F.2d 933, 935-36 (2d Cir. 1976); **Haughton Elevator Co. v. Lewis**, 572 F.2d 44, 935 n.1 (4th Cir. 1977); **Diamond M. Drilling Co. v. Marshall**, 577 F.2d 1003, 1006-09 (5th Cir. 1978); **see also Air America, Inc. v. Director, OWCP**, 597 F.2d. 773, 779 (1st Cir. 1979) ("In each case the Review Board cites, the claimant's physical impairment, education, and work experience were such as to render him theoretically capable of performing 'only a special and very limited class of work'") (quoting **Perini Corp. v. Heyde**, 306 F. Supp. 1321, 1326 (D.R.I. 1969)). Therefore, in cases arising within the jurisdiction of the First Circuit, the court must make an initial determination as to whether the facts present a situation where the burden should switch to the Employer. **See Nguyen v. Ebbtide Fabricators, Inc.**, 19 BRBS 142, 145 n.2 (1986) (noting that the Board does not follow **Air America** outside of the First Circuit).

After the **Air America** decision, several cases have focused on when the burden will remain with the Employer, falling under the limiting language in **Air America**. For example, in **CNA Insurance Co. v. Legrow**, 935 F.2d 430 (1st Cir. 1990), the First Circuit rejected the employer's argument that **Air America** should control. **Legrow** involved a claimant who suffered a back injury and could not return to his position that required heavy lifting. Following the injury the Employer brought claimant back to perform part-time clerical work, at approximately ten-hours a week, and claimant also worked briefly as a security guard. The Benefits Review Board concluded that such activity was sheltered employment and did not constitute suitable alternate employment. **Id.** The First Circuit affirmed, also noting that the claimant's "brief stint as a security" guard did not constitute suitable alternate employment, because the record did not contain any information regarding how the claimant was able to perform the job or what the duties were. The Employer had argued that **Air America** should apply, however, the court rejected this argument, noting, "This case . . . is a long way from **Air America** . . . . Although Legrow has a bachelor's degree in business administration, as well as prior office experience in addition to his managerial employment . . ., evidence of his efforts with the ten-hour a week office job with [his Employer] justified the Board's determination that the ALJ could not find that Legrow has any real ability to work in a typical office setting." **Id.** at 435. The court, citing **Air America**'s language limiting its application in cases where the future prospects of the Claimant are limited, held that the Employer had failed to satisfy its burden of proving the existence of suitable alternate employment. **Id.**

Similarly, in **Dixon v. John J. McMullen & Associates**, 19 BRBS 243 (1986), the Benefits Review Board, in a case arising within the jurisdiction of the First Circuit, upheld an administrative law judge's determination that **Air America** did not apply. **Id.** at 246. Specifically, the Board affirmed the administrative law judge's finding that because a Claimant was unable to perform a job not involving physical labor and his education prevented him from working at a desk job, the Employer had the burden to establish suitable alternate employment. **Id.**; **see also Rinaldi v. General Dynamics Corp.,** 25 BRBS 1288 (1991).

In the present case, Claimant's situation is far from that of the pilot in **Air America**. In our facts the Claimant has lost all real functioning in his right hand. Further he has an eighth grade education, and the only work he has known and performed for the last thirty-nine (39) years was as a longshoremen. Accordingly, this is a situation where Mr. Hogan's "medical impairment and job qualifications [are] such that his suitable job prospects [are] limited, if existent at all." Accordingly, I find and conclude that the burden switches to the Employer to show both the availability and suitability of alternate employment opportunities. **See CNA Insurance Co. v. Legrow**, 935 F.2d 430 (1st Cir. 1990). Therefore, to meets its burden the Employer "must demonstrate that available employment exists which Claimant, by virtue of his age, education, vocational history, and physical restrictions, was capable of performing." **Rinaldi v. General Dynamics Corp.**, 25 BRBS 128, 131 (1991).

An employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between

claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

The law in this area is very clear and if an employee is offered a job at his pre-injury wage as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corp**., 17 BRBS 145, 147 (1985); **Darcell v. FMC Corp., Marine & Rail Equipment Div.**, 14 BRBS 294, 297 (1981). I am, however, also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Const. Co.**, 17 BRBS 157 (1985).

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

In the case at bar, the Respondents have offered the testimony, reports and labor market surveys of Rosalyn Davidoff, a vocational rehabilitation counselor, who was certified at the

hearing as an expert in her field. (RX 3; RX 4; TR 67) The first labor market survey was prepared on June 25, 1997, and provided an overview of possible positions in and around South Boston, Massachusetts. Ms. Davidoff relied upon the medical evidence found in Dr. Weiner's June 3, 1997 report, and restated that the doctor's diagnosis and predicted that the work ability for the Claimant "is consistent with the work the Department of Labor classifies as medium, light, and sedentary physical strength." (RX 4) The Report also included a summary of Claimant's work and educational history. Based on an analysis of Claimant's alleged transferable skills, Ms. Davidoff listed nine possible positions, in addition to the posting of the Department of Employment and Training (DET) at a variety of salaries, which she deemed appropriate in light of Claimant physical restrictions and transferable skills.[1]

On October 29, 1997, Ms. Davidoff prepared an updated labor market survey which found, in addition to the posting of the DET, eleven (11) openings which she deemed appropriate for the Claimant's transferable skills and physical ability.

At the hearing, Ms. Davidoff limited her original list of positions at hearing after observing Claimant's testimony. Specifically, Ms. Davidoff concluded that the only positions available for Claimant would be some of the unarmed security guard position, the telephone marketer openings, and the positions as a driver. Ms. Davidoff opined that Claimant would be able to perform those duties, which, in effect, constituted a withdrawal of a number of jobs from the realm of possibilities.[2] I shall now

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[1] I pause to note that the credibility of this initial labor market survey has been impugned. On cross-examination, Ms. Davidoff acknowledged that her first report was based upon some incorrect information as to Claimant's education level. (TR 75) Ms. Davidoff testified that she was told that Claimant had a high school diploma (TR 75), when in fact, he had only reached eighth grade. (TR 18) Additionally, she noted that when a job does not list high school diploma she notes then it is "likely not needed" based on her past experience. (TR 91) Ms. Davidoff also acknowledged uncertainty as to the details of Claimant's driving record, the availability of Claimant's car for employment, and whether the jobs required the ability to use a stick shift or automatic transmission.

[2] Accordingly, I shall not consider the following positions that were provided in the two labor market surveys: fundraiser, cashier, management trainee, janitor, service provider, landscape laborer, utility line locator, warehouse worker, prepare electrostatic, sales person, mail clerk, copy clerk, (RX 4),

analyze the jobs of unarmed security guard, telephone marketer, and driver, individually.

Initially I note that the three opening for a security guard in the June 25, 1997 labor market survey all required that the applicant possess a high school diploma, or have passed the GED. (RX 4) As such, I have eliminated those positions from consideration as Claimant possesses neither a diploma nor has he taken the GED examination.

The October 29, 1997 Labor Market Survey lists seven security guard positions. (RX 3) The first position, at First Security, requires a high school diploma or GED, and I therefore withdraw that position from consideration. The remaining positions are described as requiring light strength and the duties are described as follows: "Guard entrance of industrial gate and grounds, warehouse, or other property. Directs visitors to various parts of grounds or buildings." (RX 3 at 3) Although the majority of remaining positions do not require prior experience, and some provide training, I find that Claimant is not able to perform these duties.

Claimant testified that he was not sure if he could perform the duties of a security officer. (TR 38) He noted that at age sixty-one, and without the use of his right hand, he would not be able to apprehend anyone. (TR 38) Further, due to the fact that longshore work is all he has known, he doubted his ability to learn the aspects of the security business. (TR 59) Moreover, in addition to Claimant's trepidation, he has no functional use or feeling in this right hand. Further, his ability to use and write with either hand is very poor. Thus, his ability to compose a report of activity is very limited. This, taken together with Claimant's age and experience, would prevent him from apprehending a person or dealing with an emergency situation, two of the most important functions of a security guard. Additionally, Ms. Davidoff testified that she was not aware of the state of Claimant's criminal record, while the existence of a clear, criminal record is often a pre-requisite for these positions. (TR 77) Accordingly, I find and conclude that the security guard positions do not constitute suitable alternate employment.

The October 29, 1997 Labor market Survey provided three openings for telephone solicitation, which is classified as light work, with the duties to "solicit[] orders for merchandise or

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deliverer, program aide, office manager, shop helper, cleaner, and credit/collection. (RX 3)

services over telephone. Call[] prospective customers to explain type of services or merchandise offered." (RX 3)

Claimant testified that he would occasionally make calls for personal financial and household matters, yet he doubted his ability to perform these tasks by reading from a script and noted he could not take any form of notes. (TR 60) Claimant's counsel also questioned Ms. Davidoff as to whether she felt Claimant had the verbal sophistication to handle the job, which she felt he had. (TR 78)

I find, however, the Claimant is unable to perform this job. I find Claimant's inability to use his right hand has resulted in very messy handwriting which would hinder his ability to take notes. (CX 3) I also note that the record is silent on Claimant's typing ability. This could be a great detriment should these positions require the telemarketer to made any notes to keep track of calls. Further, I note that Claimant's ability to communicate, while in no way incomprehensible, does not rise to the level of verbal sophistication for which a telemarketing employer would be looking. Accordingly, I find and conclude that Claimant, whether reading from a script or not, does not possess the verbal skills that would prompt a telemarketing employer to hire him.

Finally, the original labor market survey provided six openings under the description of driver. (RX 4) These positions were listed as requiring medium strength. Of these six, most can be eliminated from consideration based upon the requirements and comments alone. First, the DET position in Newton requires a high school diploma or GED, therefore I will not consider it. Next, two of the positions require the driver to lift up to fifty pounds, while another requires handling mail and packages. While Claimant may be able to lift fifty pounds or carry mail with his left arm, it would not be safe given the fact that he would be unable to adequately carry and balance the weight with both of his arms. Therefore I will eliminate those positions from consideration. Finally, the remaining positions require that Claimant either use his own car or have a good driving record. This closed record has no evidence of whether or not Claimant could use his own car for work, or whether Claimant has a clean driving history. Further, Claimant testified to insecurity while driving and stated that often his daughter would drive him around. Accordingly, I find and conclude that these driving positions do not constitute suitable alternate employment.

The updated labor market survey also provides six jobs under the category of driver. The listed positions almost all involve driving adult handicapped or elderly individuals, or delivering food products. I reject these positions as suitable alternate

employment for the reasons of Claimant's insecurity as to driving ability, his physical limitations and the uncertainty as to his driving record. Further, I note that these positions would involve some lifting, and in the case of handicapped or elderly, could involve situations where the driver would have to help people in and out of the vehicle and, possibly, to deal with emergency situations. Due to Claimant's inability to use his right hand, this would be a great detriment to his performance of these jobs. As to the remaining position for Courier Services, that would require Claimant to possess and use his own car, an issue on which, as noted early, the record is silent.

Claimant testified that while he could drive an automatic car, he did not do so often. This, was due to his fear of accidents because of his inability to get a steady grip on the wheel with his right hand. (TR 37) While Ms. Davidoff noted Claimant could perform driving, she did limit her opinion to automatic cars. Further, she acknowledged that some employers would fear Claimant would lack the ability to safely drive, especially in light of Claimant's bandaged hand. (TR 87) Further, Ms. Davidoff testified that she did not know that status of Claimant's driving record. (TR 76) Accordingly, I find and conclude that the driver positions listed in the labor market surveys fail to constitute suitable alternate employment.

Accordingly, based on review of the record, and as discussed above, I find and conclude that the Respondents have failed to meet their burden of proving adequate and available suitable alternate employment. As such, I find the Claimant is permanently and totally disabled from October 6, 1997 to, and through, the present and continuing.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is

well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provision of Section 14 (e), as the Respondents, although initially controverting Claimant’s entitlement to benefits, nevertheless have accepted the claim,

provided the necessary medical care and treatment and voluntarily paid certain compensation benefits while Claimant was unable to return to work. **Ramos v. Universal Dredging Corp.**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and its Carrier (Respondents). Claimant's attorney shall file his fee application concerning services rendered and costs incurred in representing Claimant after September 9, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer, John T. Clark & Sons, and Carrier, Liberty Mutual Insurance Company (Respondents), shall pay to the Claimant compensation for his temporary total disability from October 18, 1989 through October 8, 1997, based upon an average weekly wage of $733.37, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on October 9, 1997, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $733.37, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his October 17, 1996 injury.

4. Interest shall be paid by the Respondents on any accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due

until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on September 9, 1997.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:pte